

BROWNFIELDS TAX INCENTIVE FREQUENTLY ASKED QUESTIONS

This document provides answers to some of the most frequently asked questions (FAQs) about the federal Brownfields Tax Incentive. The questions are divided into the following sections:

- I. Background on the Brownfields Tax Incentive**
- II. Meeting The Geographic Criteria**
- III. Meeting The Contamination Criteria**
- IV. Determining Eligible Expenses**
- V. Meeting The Ownership Criteria**
- VI. State Certification Procedures**

I. BACKGROUND ON THE BROWNFIELDS TAX INCENTIVE

Q1: When was the Brownfields Tax Incentive passed and why?

A1: The Brownfields Tax Incentive was passed as part of the Taxpayer Relief Act (HR 2014/PL 105-34), which President Clinton signed into law on August 5, 1997. EPA and the Department of the Treasury worked with lawmakers to create the Incentive, which is needed to spur the cleanup and redevelopment of brownfields in distressed areas. The Brownfields Tax Incentive was enacted, in part, to level the playing field between taxpayers who caused environmental contamination at certain properties and those who did not.

Since 1994, the Internal Revenue Service (IRS) has ruled that certain costs incurred to assess and clean up soil and groundwater could be deducted as business expenses in the year incurred (rather than having to be capitalized over time). The IRS ruling, however, only addressed cleanup costs incurred by taxpayers who had contaminated the property. It did not address cleanup costs incurred by taxpayers who had purchased previously contaminated property. These parties had to capitalize over several years the expenses incurred to clean up the property. The new tax law provides a powerful incentive to motivate taxpayers to purchase, clean up, and redevelop brownfields in distressed areas.

Q2: Why is the Brownfields Tax Incentive beneficial?

A2: The Treasury Department estimates that the \$1.5 billion Brownfields Tax Incentive will leverage \$6 billion in private investment and return an estimated 14,000 brownfields to productive use. The Incentive permits a taxpayer to treat any “qualified environmental remediation expense” as a deductible expense in the year incurred, rather than charging the expense to a capital account. Deductible expenses reduce a taxpayer’s taxable income and thus generally reduce his or her income tax liability. Without the Brownfields Tax Incentive, new property owners had to capitalize, i.e., add to, the cost of their land remediation expenditures. These taxpayers could not recover these costs for tax purposes until they sold the land.

Q3: What are the eligibility requirements for the Brownfields Tax Incentive?

A3: To qualify, the property must be in one of the four targeted geographic areas and must have a release or a threat of release of a hazardous substance. Taxpayers must obtain certification

from the designated state agency that a site meets these two criteria. The four targeted geographic areas include:

- Census tracts with poverty rates of 20 percent or more.
- Census tracts with populations of less than 2,000 where more than 75 percent of the tract is zoned for commercial or industrial use, and the tracts are adjacent to one or more census tract(s) with poverty rates of 20 percent or more.
- Federally-designated Empowerment Zones (EZ) and Enterprise Communities (EC).
- EPA-designated Brownfields Pilot sites announced before February 1, 1997.

Sites on EPA's Superfund National Priorities List (NPL) are not eligible for the Incentive. Only expenses that are necessary to clean up environmental contamination qualify for the Incentive. Taxpayers should consult with their tax counsel to determine which expenses are eligible. The taxpayer must incur the qualified expenses after August 4, 1997 and before January 1, 2001.

The remainder of these questions and answers address each of these four general requirements (i.e., geographic, contamination, expenses, ownership), as well as information regarding state certification requirements.

Q4: Are taxpayers who cause contamination eligible for the Brownfields Tax Incentive?

A4: Responsible parties who contaminate and remediate a property without changing its use have always been able to deduct environmental cleanup costs. The Brownfields Tax Incentive broadens this allowance by permitting these same property owners to also expense these costs if they are changing the use of the property. As noted in Answer 1, the Brownfields Tax Incentive seeks to "level the playing field" between polluting and non-polluting parties by providing both with the same advantages.

II. MEETING THE GEOGRAPHIC CRITERIA

Q5: What criteria must a property meet to qualify as being located in a "targeted area?"

A5: Section 198(c)(2)(A) of the Brownfields Tax Incentive states generally that properties must be located in one of the following four targeted areas to be eligible:

- Census tracts with poverty rates of 20 percent or more.
- Census tracts with populations of less than 2,000 where more than 75 percent of the tract is zoned for commercial or industrial use, and the tracts are next to other census tract(s) with poverty rates of 20 percent or more.
- Federally-designated EZs and ECs (and any supplemental zone designated on December 21, 1994).
- EPA-designated Brownfields Pilot sites announced before February 1, 1997.

Sites on EPA's Superfund NPL are not eligible for the Incentive.

Q6: Must the property meet all or only one of the listed "targeted area" criteria?

A6: The eligible property need only meet one of the four listed criteria.

Q7: What criteria are used to determine whether the population in a census tract is “below the poverty level?”

A7: Poverty level determinations are based on data compiled and published by the Bureau of Census. Determination of poverty depends upon income and family size (generally, families of four or more with yearly incomes below \$20,000 a year are determined to be below the poverty level). Adjustments for regional or area variations in income and cost of living are not included in the nationally-determined computations.

This poverty information is publicly accessible via the Internet at several different locations.

- The Federal Financial Institutions Examination Council provides an easy-to-use tool for looking up census tract numbers for a street address or zip code at <http://www.ffiec.gov/geocode/>.
- The Census Bureau provides state-by-state lists of census tracts with poverty rates of 20 percent or more at <http://www.census.gov/ftp/pub/housing/tracts/>.
- The Census Bureau also provides an electronic tool to look up census tracts, poverty rates, and other 1990 census data to CenStats™ subscribers (current single-user subscriptions to the service are \$40 per quarter or \$125 annually). For more information, visit <http://www.census.gov/apsd/www/censtats.html>.
- The Census Bureau provides a consolidated list for resources that includes links to many of the sources listed here at <http://www.census.gov/geo/www/tractez.html>.
- Links to these and other Tax Incentive-related web sites will be added to the EPA Brownfields web site (<http://www.epa.gov/brownfields/>) in the near future.

Q8: If a locality does not have zoning, can “land use” be substituted for “land zoned” to meet the eligibility criteria?

A8: Yes. Generally, “land use” is the same as “land zoned,” unless a non-conforming use is being retained. If the local jurisdiction does not use the term “zoning,” the state agency will likely use the local equivalent to make an eligibility determination. However, because zoning occurs at the local level, most states do not have zoning designations on a statewide basis.

Q9: Does eligibility apply beyond federally-designated EZs and ECs?

A9: Only properties, or portions of properties, that lie within federally-designated EZs and ECs are eligible. Properties designated as EZs or ECs by state or local governments are not considered targeted under the Tax Incentive law.

The Department of Housing and Urban Development (HUD) provides an easy-to-use Internet tool to check whether a street address is within the boundaries of an EZ or an EC (<http://www.hud.gov/ezec/locator/>). For a more general listing of EZ/ECs, visit <http://www.ezec.gov/Communit/index.html>. In addition, links to these and other Tax Incentive-related web sites will be on the EPA Brownfields web site (<http://www.epa.gov/brownfields/>) in the near future. The information is also easily accessible from the commercially available HUD Community 2020 software package.

Q10: Are all properties within the federally-designated EZs and ECs eligible?

A10: Yes. Any property within the boundaries of a federally-designated EZ or EC meets the EZ/EC criteria.

Q11: What if only a portion of the site meets the geographic criteria? Can appropriate costs be expensed for the entire property?

A11: The EZ/EC eligibility requirement applies to remediation costs attributable to the portion of a property that lays within a federally-designated EZ or EC. If a property is only partially located within such a designated area, only remediation expenditures related to the portion of the property within that area will qualify for the Brownfields Tax Incentive.

Q12: Which of the EPA Brownfields Pilots were announced before February 1, 1997?

A12: Before February 1, 1997, EPA had announced 75 Brownfields Pilots. The list of these 75 Pilots is accessible on the EPA Brownfields web site at http://www.epa.gov/brownfields/html-doc/list_st.htm. In addition, contact information for these Pilots is accessible on the web site at <http://www.epa.gov/brownfields/contacts.htm>.

Q13: Are all properties within a Brownfields Pilot's political boundaries eligible for the Incentive? Must the properties be inventoried and/or targeted by the Pilot?

A13: Only those properties within a Brownfields Pilot's political boundaries that are actively involved in Pilot activities meet the Brownfields Pilot criteria. The property does not have to be using Pilot funds to be eligible, but must be acknowledged by the Pilot project manager as part of the Pilot. Most Brownfields Pilots have targeted specific areas or communities and eligible properties must be in these areas. The designated Pilot project manager will provide a certification to the taxpayer and/or designated state agency if a property meets this eligibility criterion. Further, only those portions of the property that fall within the designated Pilot area boundaries are eligible for the Incentive. Again, the list of these 75 Pilots is accessible on the EPA Brownfields web site at http://www.epa.gov/brownfields/html-doc/list_st.htm.

Q14: Is the entire state eligible for the Brownfields Tax Incentive in statewide Brownfields Pilots?

A14: No. Only those properties officially recognized by the Pilot project manager as part of the Pilot are eligible for the Brownfields Pilot certification. For example, Minnesota initially identified approximately 50 properties in its Pilot application. Only these 50 properties would meet the Brownfields Pilot criterion.

Q15: If an eligible Brownfields Pilot has expanded since its cooperative agreement was signed, is the expanded area eligible for certification?

A15: No. Only properties/areas targeted by the Pilot at the time of its cooperative agreement negotiations are eligible.

Q16: Will those Pilots whose cooperative agreements are coming to a close still be eligible for the Incentive?

A16: Yes. The only requirement is that they were designated as a Brownfields Pilot before February 1997.

Q17: Does the Tax Incentive apply to a Resource Conservation and Recovery Act (RCRA) facility meeting all other requirements?

A17: Yes.

Q18: Are assessment and cleanup expenses incurred at NPL sites eligible for the Incentive?

A18: Sites listed on EPA's NPL are not eligible for the Incentive.

Q19: What documentation do the states require to certify that a property meets the "targeted area" criteria?

A19: Each state has its own documentation requirements for property certification. Taxpayers and/or their tax counsel should contact their designated state agency to determine what documentation is required. To certify that a property is eligible under the zoning criteria, states may require that the applicant attach a letter from the appropriate municipality certifying that the area meets the industrial zoning criteria. In addition, the taxpayer must get state certification regarding contamination at the property (see Questions 39-44). Taxpayers can find contact information for their designated state agencies by accessing the EPA Brownfields web site at <http://www.epa.gov/brownfields/contacts.htm>.

Q20: Are there other information sources or tools to help me determine if my property is eligible for the Brownfields Tax Incentive?

A20: Yes. EPA has developed a fact sheet entitled "How to Find Out Whether a Property Is Eligible for the Brownfields Tax Incentive" (EPA 500-F-98-140, June 1998), which is available on the EPA Brownfields web site at <http://www.epa.gov/brownfields/gdc.htm#tax>. This document contains a variety of tools (e.g., printed references, Internet resources, PC-based resources) to help taxpayers determine if their property meets the geographic eligibility criteria.

III. MEETING THE CONTAMINATION CRITERIA

Q21: Does "hazardous substance" as defined in the Brownfields Tax Incentive exclude contamination from oil and/or mixtures with oil?

A21: The definition of "hazardous substance" in the tax provision is in large part based on Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Section 101(14) contains a qualified exclusion for petroleum, including crude oil and its fractions. However, hazardous substances that are mixed with petroleum products qualify as hazardous substances under CERCLA and may also qualify under the Brownfields Tax Incentive.

More information regarding the petroleum exclusion can be found on the EPA Internet site at <http://www.epa.gov/superfund/programs/er/triggers/haztrigs/whatsub3htm>.

Q22: Does the Brownfields Tax Incentive distinguish between hazardous wastes and hazardous substances?

A22: No. The definition of “hazardous substance” in CERCLA Section 101(14) includes certain “hazardous wastes.” For example, the CERCLA definition of hazardous substances includes wastes that EPA lists under RCRA or hazardous wastes that are ignitable, corrosive, reactive, or toxic.

Q23: Can EPA clarify “a release or threat of a release?”

A23: This definition is at the discretion of the state. Much case law exists on what constitutes a release or threat of a release that should help the states in making this determination.

Q24: What documentation must taxpayers provide to show that there has been a release or a threat of release?

A24: Each state has its own documentation requirements for property certification. Taxpayers should contact their designated state agency to determine what documentation it requires. Some states may require, for example, that the property owner provide photographs or other physical evidence such as sampling data from Phase 1 and 2 site assessments.

IV. DETERMINING ELIGIBLE EXPENSES

Q25: Can the expenditures from the removal of asbestos or lead from a building be deducted under the Brownfields Tax Incentive?

A25: Section 198(d) of the Brownfields Tax Incentive says that the removal or remediation of a hazardous substance only qualifies for deduction if the removal or remediation of that substance is permitted under CERCLA Section 104(a)(3). CERCLA specifically limits EPA’s authority to respond to the release or threat of a release from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures. Taxpayers should consult with tax counsel to determine the circumstances in which a taxpayer’s activities may qualify for deduction.

Q26: Do costs for site assessment and investigation activities qualify as remediation expenditures under the Brownfields Tax Incentive?

A26: Yes. Site assessment and investigation activities are qualified environmental remediation expenditures if incurred “in connection with the abatement or control of hazardous substances at a qualified contaminated site.” Site assessment efforts must, therefore, be part of a larger abatement or control effort to qualify under the Tax Incentive.

Q27: Can expenditures for assessment or monitoring inside a building qualify for the

Brownfields Tax Incentive?

A27: These expenditures may qualify for the Brownfields Tax Incentive if the costs can be characterized as environmental remediation costs and were used in connection with the abatement or control of a release or a threat of release of a hazardous substance.

Q28: Do the costs related to construction of access roads and operations and maintenance (O&M) qualify as remediation expenditures?

A28: Yes, if the access road or O&M activity is necessary for the remediation to occur.

Q29: Do state voluntary cleanup program (VCP) oversight fees qualify as remediation expenditures?

A29: Yes, if these costs are used in connection with the abatement or control of a release or threat of release or disposal of a hazardous substance and can otherwise be characterized as remediation expenditures.

Q30: Can taxpayers deduct and/or depreciate the remediation expenditures under the Brownfields Tax Incentive if they are going to reuse the property for a park or open space?

A30: No, the taxpayer must hold the property for use in trade or business or for the production of income to qualify for the Brownfields Tax Incentive. However, the taxpayer should discuss special situations such as this with the Department of the Treasury because the law does not intend to discourage owners from dedicating properties for public use.

Q31: How would the Brownfields Tax Incentive apply in a situation where a taxpayer capped soil contamination with a parking lot or the foundation of a building?

A31: The service costs related to the soil remediation and cap construction would be deductible. The portion of the parking lot truly functioning as the cap (underneath the asphalt) may qualify as a deductible expense under the Incentive. Building foundations are always capitalized as part of the land of the property and are, therefore, already treated as depreciable assets.

Q32: Assume a responsible party settled with a state, and the state uses these funds to conduct remediation activities over the next few years. Can the taxpayer claim these expenditures under the Brownfields Tax Incentive?

A32: Qualified settlement funds were not addressed in the legislation. It is unlikely that the taxpayer would be able to claim these expenses since the funds have already been turned over to the state. Taxpayers may want to discuss this issue with the Department of the Treasury.

Q33: Does the IRS plan to issue regulations listing those costs that qualify as eligible expenses under the Brownfields Tax Incentive and those that do not?

A33: No. At this point, the IRS does not plan to issue regulations about the Brownfields Tax Incentive. The IRS does, however, plan to issue a “news release” to provide more guidance on the Brownfields Tax Incentive.

Q34: What is the effective date of the tax law that triggers when a taxpayer’s assessment and cleanup expenditures can be eligible for deduction under the Tax Incentive?

A34: The President signed the Brownfields Tax Incentive bill into law on August 5, 1997. Any expenditures paid for or incurred after that date and prior to the law’s expiration on December 31, 2000, that meet all other criteria, are eligible for the Tax Incentive.

V. MEETING THE OWNERSHIP CRITERIA

Q35: Does an environmental assessment paid for by a prospective purchaser of a qualified contaminated site qualify as an environmental remediation cost?

A35: Generally, these costs are not eligible for the Tax Incentive since the law requires that the property must be “held by the taxpayer.” Taxpayers should consult with tax counsel to determine circumstances in which property is considered “held by the taxpayer” for purposes of determining whether it is a “qualified contaminated site.”

Q36: Can investment properties and properties held by a developer for future sale qualify for the Tax Incentive?

A36: Yes. Properties held by the taxpayer for use in trade or business or for the production of income, including investment properties and properties held by a developer for future sale, can qualify for the Brownfields Tax Incentive.

Q37: Are properties owned by a municipality, and leased to a taxpayer, eligible for the Brownfields Tax Incentive?

A37: The answer depends upon whether the property is considered “held by the taxpayer.” There are conceivable circumstances where a municipally-owned property might be considered a qualified contaminated property and where environmental remediation costs might qualify for the Incentive. A taxpayer who pays for remediation at a property for which he or she has a long-term lease (e.g., 99 years) on municipally-owned property might qualify for the Incentive. Taxpayers should consult with tax counsel to determine circumstances in which a taxpayer’s property may qualify for the Incentive.

Q38: Are there any circumstances where leased or rented properties would meet the criteria “held by the taxpayer?” For example, if an historic land trust specifically prevents ownership and the tenant operates on repeating 3-year leases, would the tenancy qualify as being held by the taxpayer-tenant?

A38: Again, the answer depends upon whether the property is considered “held by the taxpayer.” There are conceivable circumstances where a leased property might qualify for the

Incentive. A taxpayer that pays for remediation at a property for which he or she has a long-term lease (e.g., 99 years) might qualify for the Incentive. Short-term leases, including 3-year leases, would probably not qualify unless there was a continuing commitment to renew the lease year after year. Taxpayers should consult with tax counsel to determine circumstances in which the taxpayer's property may qualify.

VI. STATE CERTIFICATION PROCEDURES

Q39: How does a taxpayer certify that a property is eligible for the Brownfields Tax Incentive?

A39: The designated state agency (usually the department responsible for environmental protection) must certify that the property meets the geographic and contamination criteria. Taxpayers must request certification from their designated state agency. Each state has its own documentation requirements for property certification. Taxpayers should contact their designated state agency to learn what documentation the state requires. Certifications are valid for the applicable life of the Tax Incentive. Taxpayers should attach these certifications to their tax returns. Taxpayers can find contact information for their designated state agencies by accessing the EPA Brownfields web site at <http://www.epa.gov/brownfields/contacts.htm>.

The taxpayer is responsible for certifying that he or she holds the property for business purposes and that he or she incurred qualified environmental remediation expenses.

Q40: How do states certify eligible properties?

A40: Upon request, states will provide a taxpayer with a written statement certifying that a specific property meets the following two elements of the "qualified contaminated site" requirement: (a) the site is within a defined targeted area; and (b) there has been a release or a threat of release of any hazardous substance at or on the property. States will not determine whether the action the taxpayer takes is a qualified remediation expenditure. It is expected that taxpayers will rely upon tax counsel, not their designated state agency, for clarification of other issues related to the Brownfields Tax Incentive.

Q41: How long are property certifications valid? Will the states have to issue certifications for sites incurring ongoing O&M costs each year?

A41: Certifications are valid for the applicable life of the Incentive (currently scheduled to sunset on December 31, 2000). The taxpayer should copy the certification and attach it to his or her tax return each year. If a property is in a qualified area one year, it will remain eligible in subsequent years. The taxpayer's counsel and the IRS, not the states, are responsible for determining whether the ongoing O&M costs are eligible remediation expenditures.

Q42: Can a state certify a property before any work has been done on abatement and control?

A42: Yes. States are responsible for certifying that the geographic criteria have been met and

that a release or threat of a release exists, not that any cleanup action has taken or will take place.

Q43: What if a request for certification identifies a contaminated property of which the state was not previously aware? Do the certified Tax Incentive properties go on a federal cleanup “list?”

A43: If a state learns about a property through the certification process, it can notify its enforcement division. EPA does not believe this will create a disincentive to requesting certification. This does, however, raise the point that the taxpayers may want to gather some preliminary information on their property before talking to the state about it. Taxpayers can use tools available over the Internet, such as census data and LandView®, to do this. There is no federally-maintained list of properties certified under the Brownfields Tax Incentive. States, however, may maintain such a list and may choose to refer sites of potential federal interest to EPA.

EPA has developed a fact sheet entitled “How to Find Out Whether a Property Is Eligible for the Brownfields Tax Incentive” (EPA 500-F-98-140, June 1998), which is available on the EPA Brownfields web site at <http://www.epa.gov/brownfields/gdc.htm#tax>. This document contains a variety of tools (e.g., printed references, Internet resources, PC-based resources) to help taxpayers determine if their property meets the geographic eligibility criteria.

For example, the Census Bureau, in cooperation with EPA, developed a CD-ROM product known as LandView III (<http://www.census.gov/mp/www/rom/msrom12h.html>) to map EPA-regulated sites and view various census statistics for the surrounding areas. LandView is useful for identifying tracts because it defines their boundaries and also shows local streets and landmarks. LandView is available from the Census Bureau (\$549 for a set of 11 CDs covering the entire country or \$99 for a single region). You can also download a free abbreviated version of LandView for a single county (<http://www.rtk.net:80/landview/>).

Q44: Can a state that requires taxpayers by law to inform the state of a release or threat of a release use the Brownfields Tax Incentive certification requests as a form of such notification and require the owner to undergo cleanup?

A44: No, but the state can turn any new information over to its enforcement division. States should, however, put a disclaimer on the certification application materials informing the taxpayer that the states may pass information to their enforcement branches. In drafting the legislation, EPA hoped it would spur voluntary cleanup, since citizens would be reluctant to go to their state environmental agency unless they were planning to comply with cleanup requirements.

For more information on the Brownfields Tax Incentive, please contact Karl Alvarez at EPA Headquarters at (202) 260-3525 or alvarez.karl@epa.gov.